86-862

Supreme Court, U.S.
FILED
NOV 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

KARL POTTS, ET AL., PETITIONERS

v.

MAGGIE BELL HEATHCOAT, ADMINISTRATRIX FOR THE ESTATE OF LEONARD JAMES HEATHCOAT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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30pp

QUESTION PRESENTED

Whether the immunity recognized in *Barr* v. *Matteo*, 360 U.S. 564 (1959), protects petitioners—federal employees sued in their individual capacities—from liability under state tort law for injuries allegedly caused by their official acts.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Charles Davis, Robert D. Mitchell, Ray Montgomery, Herbert Plyler, Kenneth Rhoden, and William Clyde Snoddy are defendants in the district court and petitioners in this Court.

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KARL POTTS, ET AL., PETITIONERS

v.

MAGGIE BELL HEATHCOAT, ADMINISTRATRIX FOR THE ESTATE OF LEONARD JAMES HEATHCOAT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of Karl Potts, Charles Davis, Robert D. Mitchell, Ray Montgomery, Herbert Plyler, Kenneth Rhoden, and William Clyde Snoddy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 790 F.2d 1540. The order of the court of appeals granting permission to appeal pursuant to 28 U.S.C. 1292(b) (App., *infra*, 11a) is unreported. The orders of the district court (App., *infra*, 12a-13a, 14a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 16a-17a) was entered on June 10, 1986. A petition for rehearing was denied on August 28, 1986 (App., *infra*, 18a-19a). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

1. This is a common law tort action, which was initiated in state court and removed to federal court by petitioners, all of whom are federal employees. Respondent seeks monetary damages for injuries allegedly caused by conduct that was within the scope of petitioners' official duties. Leonard Heathcoat, respondent's decedent, was employed by the Tennessee Valley Authority (TVA); his duties included dismantling a phosphorus furnace building at TVA's National Fertilizer Center in Muscle Shoals, Alabama. App., *infra*, 2a; Wood Affidavit, dated October 18, 1984, at 1-2.

Petitioners are TVA employees "[e]ach of [whom] was in some fashion a supervisor of the removal operations" being performed by Leonard Heathcoat (App., *infra*, 5a). Thus, petitioner Karl Potts was the chief of the maintenance branch of the Office of Agricultural and Chemical Development (OACD)—the component of the TVA that operates the Muscle Shoals facility—and was responsible for planning and supervising all maintenance functions for that component of the TVA; Kenneth Rhoden was the assistant chief of the maintenance branch and served as Potts' deputy; William Clyde Snoddy was the general foreman of the maintenance branch, charged with supervising the activities of more than 200 employees; Charles Davis was an assistant manager of the

OACD and director of the division of chemical development with responsibility for planning and administering the TVA's entire chemical research and engineering program; Robert Mitchell was an assistant director of the OACD and assisted the director of chemical development in the overall planning of the work of the chemical development division; Ray Montgomery was a hazard control specialist charged with planning and coordinating safety programs for the OACD; and Herbert Plyler was a safety specialist with similar responsibilities.[1]

On the morning of September 16, 1983, Leonard Heathcoat was using a torch to cut the steel supports below the roof of the phosphorus furnace building. That afternoon "[h]e went upon the roof to help pry loose concrete slabs, and pried up one or two slabs, but the next slab collapsed beneath him and he fell approximately 50 feet to his death." App., *infra*, 2a; Wood Affidavit, dated October 18, 1984, at 1-2.

Respondent subsequently commenced this action against petitioners in Alabama state court. She alleged that petitioners "had the duty to provide [Leonard Heathcoat] a safe place to work and/or a reasonably safe work environment" and that petitioners "negligently or wantonly breached this duty." Complaint at 2. Respondent demanded damages in the amount of $1 million (*id.* at 4-5).

Petitioners removed the action to the United States District Court for the Northern District of Alabama pursuant to 28 U.S.C. 1442(a)(1); they filed a motion to dismiss or, in the alternative, for summary judgment on the grounds that (1) they

[1] This discussion of petitioners' duties is based upon the job descriptions that are included in the summary judgment record (see App., *infra*, 5a).

were absolutely immune from suit under *Barr* v. *Matteo*, 360 U.S. 564 (1959); (2) the release in the personal service contract entered into by respondent's decedent bars respondent's claim for damages; and (3) respondent's damages claim is barred by the exclusive remedy provision of the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8116(c).[2]

The district court denied the motion without opinion (App., *infra*, 12a-13a). It subsequently granted petitioners' motion to certify the contract and FECA issues for interlocutory appeal pursuant to 28 U.S.C. 1292(b) (App., *infra*, 14a-15a).

2. The court of appeals affirmed (App., *infra*, 1a-10a). The court concluded with respect to the immunity issue that "the governing principle is clear: a government employee enjoys immunity only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the act or the line of duty. 'Discretionary acts' involve planning or policy considerations and do not concern day to day operations" (*id.* at 4a (emphasis in original; citations omitted)).

The court noted that petitioners each were "in some fashion a supervisor of the removal operations being conducted by TVA's Office of Agricultural and Chemical Development" (App., *infra*, 5a). It observed that the summary judgment record contained petitioners' job descriptions and answers to respondent's interrogatories, but characterized the job descriptions as "detailed but abstract" and the interrogatory responses as "defensive and unilluminating" (*ibid.*). It concluded that the district court properly denied petitioners' motion for summary judgment,

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[2] Respondent is receiving benefits under FECA as a result of the death of Leonard Heathcoat (Hester Affidavit, dated October 16, 1984, at 1-2).

observing that "whether, on a fuller development of the facts, an immunity defense might prove meritorious is for the district court" (*id.* at 6a).[3]

REASONS FOR GRANTING THE PETITION

The question presented in this case is the same as the question presented in *Westfall* v. *Erwin*, petition for cert. pending, No. 86-714, *i.e.*, whether a federal employee is subject to personal liability under state tort law for his official acts.[4] The court of appeals in the present case concluded that petitioners were not entitled to immunity from tort liability because "a government employee enjoys immunity only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the act or the line of duty" (App., *infra*, 4a (emphasis in original)), the same rule that was applied by the court of appeals in *Westfall*. As we argued in our petition in *Westfall* (at 9-18), this narrow application of immunity doctrine is inconsistent with the reasoning in *Barr* v. *Matteo*, 360 U.S. 564 (1959). We submit that a federal employee is entitled to immunity from liability under state tort law as long as he acts within the scope of his official duties.[5]

---

[3] The court of appeals also rejected petitioners' arguments that respondent's claim is barred by the Federal Employees' Compensation Act and the release clause in the employment contract entered into by respondent's decedent (App., *infra*, 6a-10a).

[4] We have served counsel for respondent with a copy of the petition in *Westfall*.

[5] Since petitioners and respondent's decedent all were federal employees, and respondent's claim relates to their common workplace, immunity would be appropriate here if the

In addition, petitioners here, like the petitioners in *Westfall* (see 86-714 Pet. 18-20), would be immune from tort liability even if this Court were to determine that immunity is limited to federal employees who exercise discretion. Petitioners' planning, supervisory, and safety duties plainly require them to make a variety of sensitive judgments in determining whether to undertake particular projects and evaluating the effects of those projects upon the safety of the workplace. Even if the exercise of discretion is a necessary prerequisite to a federal employee's absolute immunity from common law torts, therefore, petitioners should be afforded immunity so that their exercise of discretion will not be affected by the fear of potential personal liability.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in view of the disposition of the petition in *Westfall* v. *Erwin*, No. 86-714.

Respectfully submitted.

CHARLES FRIED
Solicitor General

LEWIS E. WALLACE
Acting General Counsel
Tennessee Valley Authority

NOVEMBER 1986

Court adopts an immunity rule that applies to common law law tort actions brought by one federal employee against a fellow employee (see 86-714 Pet. 18 n.17).

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 84-7805, 85-7288

MAGGIE BELL HEATHCOAT, AS ADMINISTRATRIX FOR THE ESTATE OF LEONARD JAMES HEATHCOAT, DECEASED, PLAINTIFF-APPELLEE

v.

KARL POTTS, ET AL., DEFENDANT-APPELLANTS

Appeals from the United States District Court
for the Northern District of Alabama

June 10, 1986

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

GODBOLD, Chief Judge:

These consolidated appeals arise from the death of Leonard Heathcoat while he was employed by TVA in Muscle Shoals, Alabama under a personal services contract for temporary work.

Heathcoat was working on the dismantling of a building at TVA's National Fertilizer Development Center. His job was to cut steel supports below the roof as part of the effort to remove the roof. He went upon the roof to help pry loose concrete slabs, and pried up one or two slabs, but the next slab collapsed beneath him and he fell approximately 50 feet to his death.

Plaintiff, the widow as administratrix, filed this wrongful death action, pursuant to Alabama law, in state court, against seven supervisors and staff specialists of TVA, seeking damages. The case was removed to the district court.

Plaintiff alleged that the defendants failed to provide her husband a safe place and environment in which to work and did not properly control the conditions, methods, and manner in which work was performed. The defendants answered and moved for summary judgment on the grounds that (1) they were federal supervisory employees exercising discretionary functions and acting within the outer perimeters of their lines of duty and thus are absolutely immune from this state tort action; (2) plaintiff's claim is barred by the release contained in Heathcoat's personal services contract with TVA; and (3) the action is barred by the exclusive remedy provisions of FECA, 5 U.S.C. § 8116(c) (1982), because the defendants were acting as alter egos or instrumentalities of TVA in fulfilling duties that TVA owed Mr. Heathcoat.

Following discovery, plaintiff responded to defendants' motion for summary judgment. The district court, without a hearing, denied defendants' motion without any statement of reasons.

Defendants filed a timely notice of appeal from the district court's order pursuant to 28 U.S.C. § 1291,

on the ground that the denial of official immunity was appealable under the collateral order doctrine. This became case No. 84-7805. Contemporaneously defendants moved the court to certify under 28 U.S.C. § 1292(b) the two remaining questions presented by their motion for summary judgment. The district court granted the motion, this court granted permission to appeal, and this appeal became case No. 85-7288. The two appeals were consolidated.

A number of cases have permitted collateral order appeals from denial of a claim of absolute immunity. *See Williams v. Collins*, 728 F.2d 721 (5th Cir. 1984); *Chavez v. Singer*, 698 F.2d 420 (10th Cir. 1983); *Evans v. Dillahunty*, 711 F.2d 828 (8th Cir. 1983); *McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982); *Forsyth v. Kleindienst*, 599 F.2d 1203 (3rd Cir. 1979). Heathcoat contends that this case is not within *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) because it does not present a serious and unsettled question. We hold that *Cohen* applies. The unsettled nature of a serious question is demonstrated by events in this court that followed the taking of the instant appeal.

In March 1985 we held in *Johns v. Pettibone Corp.*, 755 F.2d 1484 (11th Cir. 1985) that defendant TVA employees enjoyed absolute immunity for ordinary torts committed within the scope of their jobs unless the tort alleged was of constitutional magnitude. On August 26, 1985 the court withdrew its March opinion and entered another opinion. On petition for rehearing and rehearing en banc, on November 12, 1985, the court deleted part C of the August 26 opinion and substituted a new part C, covering the immunity issue. The August 26 opinion,

as amended by the opinion of November 12, appears at 769 F.2d 724 (11th Cir. 1985).

Intervening in these events, a different panel handed down for the court on November 4, 1985, *Franks v. Bolden*, 774 F.2d 1552 (11th Cir.), *reh'g en banc denied*, 781 F.2d 905 (1985), holding that official immunity did not extend to acts performed by TVA employee-defendants concerning day to day operations and not involving planning or policy consideration. Despite the later issue date of the opinion, *Franks* cites to the November 12 amended opinion entered in *Johns*.

Also to be considered is *Hendrix v. Patterson*, 776 F.2d 1056 (11th Cir.) (order without opinion), *reh'g en banc denied*, 779 F.2d 60 (1985), an unpublished opinion issued October 24, 1985 and handed down for the court by the same panel that decided *Franks*. Citing both *Franks* and the November 12 opinion in *Johns*, it holds summarily that the acts of the TVA defendants at issue were operational in nature and involved no governmental policy or planning concerns, thus official immunity was not available.

Despite this confusing sequence of events the governing principle is clear: a government employee enjoys immunity only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the act or the line of duty. *Johns*, 769 F.2d at 728. "Discretionary acts" involve planning or policy considerations and do not concern day to day operations. *Franks*, 774 F.2d at 1555.

In *Johns* the district court granted summary judgment to the defendants on the ground that plaintiff's decedent was an invitee on TVA property and the individual TVA defendants had no duty to warn invitees of the hazard involved. On appeal the TVA

defendants asserted immunity as an alternative ground supporting the summary judgment, although the issue had not been mentioned by the court in granting summary judgment. This court declined to reach the issue under these circumstances and remanded it to the district court to deal with it. In *Franks* the district court had conducted a hearing on the immunity issue, and the case had been tried before a jury with a verdict for plaintiffs. Thus the issue was before the court of appeals on a full record, and this court held, construing all the evidence in the light most favorable to the TVA defendants, that there was no way in which the acts in question could be termed anything but operational. 774 F.2d at 1555 n.3. *Hendrix* also had been tried to a jury which returned a verdict for plaintiffs. Presumably, as in *Franks*, there was a full record for this court to consider.

In this case the seven individual defendants are: Karl Potts, chief maintenance branch, division of chemical operations; Clyde Snoddy, general foreman; Ray Montgomery, hazard control specialist; Charles Davis, assistant office manager; Kenneth Rhoden, assistant branch chief, maintenance branch; Robert Mitchell, assistant director, division of chemical development; and Herbert Plyler, safety specialist.

Each of these defendants was in some fashion a supervisor of the removal operations being conducted by TVA's Office of Agricultural and Chemical Development. The summary judgment record contains job descriptions for each of the defendants and the defendants' answers to interrogatories propounded by the plaintiff. The job descriptions are detailed but abstract. The responses to the plaintiff's interrogatories are defensive and unilluminating. On this record we find no error in the denial of summary

judgment on immunity grounds; whether, on a fuller development of the facts, an immunity defense might prove meritorious is for the district court.

FECA bar

Plaintiff made a claim for her husband's death under the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101-8193. The defendants contend that the exclusive remedy provision of FECA, 5 U.S.C. § 8116(c), bars this suit.[1] FECA is silent on the matter of co-employee suits. The FECA provides that if the United States and its "instrumentalities" are liable under its provisions, recovery under this act is the employee's exclusive remedy against these parties. 5 U.S.C. § 8116(c) (1982). In *Allman v. Hanley*, 302 F.2d 559, 563 (5th Cir. 1962), this court held that this provision does not bar suits by co-employees. The Sixth Circuit in *Bates v. Harp*, 573 F.2d 930, 935 (6th Cir. 1978), adopted the Fifth Circuit approach. Defendants try to distinguish these cases on two grounds. First, they argue that these cases only decided the issue of whether the statute created a per se bar to suits against co-employees and therefore courts are free to determine on a case by case basis whether a particular co-employee is an "instrumentality." This distinction fails because the courts in *Allman* and *Bates* held that absent specific language the statute should not be construed to abrogate the common law right to sue a co-employee.

Defendants also attempt to avoid the bite of *Allman* by arguing that the court in *Allman* ruled that

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[1] The court in *Franks* declined to address this issue because it had not been presented to the district court. 774 F.2d at 1554 n.2.

this statute should be construed in accordance with the law in the majority of the states and that since the decision in *Allman* the majority of states have adopted a contrary rule. This argument fails for two reasons. First, the *Allman* court did not establish such a rule; it only looked to the law of the majority of states to determine what the common law was so that it could apply the canon of statutory construction that a court will assume that Congress changed the existing law when the statute shows a clear manifestation of intent on the part of Congress to do so. Second, defendants' proposed rule would allow states to change the contours of established federal law where there is no indication that Congress had any intention of delegating such power to the states. As just noted, the court in *Allman* only looked to the common law of the states to determine the context in which Congress acted; it did not decide that state law controls interpretation of federal law.

Defendants' final contention is that this suit is barred because the Alabama Supreme Court in *Slagle v. Parker*, 370 So.2d 947 (Ala.1979), held that provisions of the Workmen's Compensation Act immunized co-employees from wrongful death suits. *See* Ala.Code 25-5-11. There is no indication that the TVA is covered by the Alabama Workmen's Compensation Act. The fact that the Alabama legislature has relieved employees of participating employers from certain liabilities does not imply that they wished to relieve employees of the federal government of the same liability. In the first situation, the relief is part of one compensation scheme enacted by the state; the second situation would involve applying part of that scheme to an unrelated compensation scheme.

Waiver

As we have pointed out Heathcoat was covered by FECA and payments are being made to plaintiff pursuant to its terms. The defendants' waiver argument is based upon paragraph 6 of the contract under which Heathcoat was employed, which provided:

> 6. In the event that Contractor sustains personal injuries in the course of and arising out of the performance of services or travel under this contract and such injuries do not fall within the coverage of the Federal Employees' Compensation Act, TVA agrees to pay the injured party such medical expenses as in the opinion of TVA's Medical Director may be necessary as a part of proper and adequate treatment for such injuries. In consideration of such agreement by TVA, Contractor hereby waives any claim, demand, action, or cause of action that Contractor may have against the United States, TVA, its agents, employees, or Contractors arising out of, resulting from, or in any way connected with such personal injuries. Contractor agrees to observe all safety rules required by TVA.

This waiver is "in consideration of TVA's effort to protect the contractor *if he was not adequately protected under FECA.*" (emphasis supplied). This extension of coverage by TVA (its "effort") fills a hole in the contractor's protection by affording supplemental compensation-type benefits for non-FECA claims.

For its part, by the first sentence of paragraph 6, TVA agrees to pay medical expenses for such a non-FECA injury. Thus: If a "contractor sustains personal injuries . . . and such injuries do not fall

within the coverage of [FECA]. . . ." then TVA agrees to pay "such medical expenses" as sustained for treatment "for such injuries."

In consideration of TVA's undertaking, the second sentence of paragraph 6, the contractor waives claims "arising out of, resulting from, or in any way connected with *such injuries*." The "such injuries" the claims for which the contractor gives up by the second sentence are the same "such injuries" that TVA agrees to become responsible for by the first sentence, that is, *claims falling outside of FECA*. The contractor gets the added protection of compensation-type benefits for injuries not falling within the applicable compensation act, and he waives his right to sue for the injuries included within this additional coverage. This is a square trade-off. It is the historical trade-off where compensation-type benefits are provided.

Defendants contend that Heathcoat waived any cause of action for injuries arising out of the performance of services under his contract. This bar to the whole universe of injuries would assign to "such personal injuries", in the second sentence, a meaning that sweeps much more broadly than the "such injuries", "such medical expenses," and "such injuries" as they appear in the first sentence. This reading is not supported by the language of paragraph 6 itself or anything else in the record. It is an implausible reading of paragraph 6 and an implausible trade-off as well.

The proof of the pudding—that the "such personal injuries" that are waived in the second sentence do not mean the whole universe of injuries sustained under a contract with TVA—is that such a waiver would bar Heathcoat's FECA claim. It would be a

useless act for TVA to extract a waiver for a claim covered by FECA, which contains its own exclusive remedy clause (which TVA asserts as a bar). And, if the defendants' argument were correct, the FECA benefits that TVA is currently paying to plaintiff's estate are being paid even though they were waived by paragraph 6. Thus defendants' interpretation is inconsistent with TVA's own interpretation of paragraph 6.

The overall scheme is straightforward, clear and simple:

> (1) Injuries under FECA are covered by FECA itself, which contains its own limitations on right to sue.
>
> (2) TVA has supplemented FECA by agreeing to pay medical expenses for non-FECA injuries.
>
> (3) The contractor has waived his right to sue on non-FECA claims falling within the supplementary coverage.

Applying the scheme to this case, the paragraph 6 waiver has no application to this claim for damages which is for injuries that fall within the coverage of FECA.

AFFIRMED and REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-2000

KARL POTTS, KENNETH RHODEN, CLYDE SNODDY, RAY MONTGOMERY, HERBERT PLYLER, CHARLES DAVIS and ROBERT D. MITCHELL, PETITIONERS

versus

MAGGIE BELL HEATHCOAT, Administratrix for the Estate of LEONARD JAMES HEATHCOAT, Deceased, RESPONDENT

On Application for Leave to Appeal
from an Interlocutory Order

[Filed Apr. 30, 1985]

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

BY THE COURT:

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is GRANTED. The clerk shall consolidate with No. 84-7805.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV84-AR-1676-S

MAGGIE BELL HEATHCOAT, as Administratrix for the Estate of Leonard James Heathcoat, PLAINTIFF

v.

KARL POTTS, ET AL., DEFENDANTS

[Filed Oct. 22, 1984]
[Denied Dec. 10, 1984]

MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANTS POTTS, RHODEN, SNODDY, MONTGOMERY, DAVIS, MITCHELL, AND PLYLER

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendants Potts, Rhoden, Snoddy, Montgomery, Davis, Mitchell, and Plyler respectfully move the Court for judgment in their favor dismissing this action against them with prejudice on the grounds that the pleadings, answers to interrogatories, and other papers on file, together with the affidavits of Talmadge Wood and H. D. Hester filed herewith, establish the following defenses as a matter of law:

1. Plaintiff's claims against these defendants are barred by the release in plaintiff's decedent's personal

services contract with Tennessee Valley Authority (TVA).

2. Plaintiff's claim is barred by the exclusive remedy provisions of the Federal Employees' Compensation Act because at all relevant times the defendants were acting as alter egos or instrumentalities of TVA in fulfilling duties which TVA owed plaintiff's decedent.

3. At all relevant times the defendants were Federal employees exercising discretionary functions and acting within the outer perimeters of their lines of duty and thus are absolutely immune under the official immunity doctrine from this tort action.

Respectfully submitted,

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/s/ Robert C. Glinski
ROBERT C. GLINSKI

/s/ Ralph E. Rodgers
RALPH E. RODGERS
Attorneys for Defendants
Potts, Rhoden, Snoddy,
Montgomery, Davis,
Mitchell, and Plyler

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 84-AR-1676-S

MAGGIE BELL HEATHCOAT, Administratrix for the Estate of Leonard James Heathcoat, PLAINTIFF

vs.

KARL POTTS, ET AL., DEFENDANTS

[Filed Dec. 28, 1984]

ORDER

Defendants Potts, Rhoden, Snoddy, Montgomery, Davis, Mitchell and Plyler, pursuant to 28 U.S.C. § 1292(b), have requested this court to certify two questions for appeal which would not otherwise be appealable. Because an appeal as to one issue has already been taken by defendants as a matter of right, and because the court agrees with defendants that the other issues upon which they wish to appeal involve controlling questions of law, any one of which would be dispositive of the case if they are correct, and because there is substantial ground for difference of opinion so that an immediate appeal from the or-

der of December 10, 1984, as to the additional issues may materially advance the ultimate determination of the litigation, the court hereby STAYS the proceedings in the district court and CERTIFIES to the Court of Appeals for the Eleventh Circuit the following questions:

1. Whether the release contained in Leonard Heathcoat's personal service contract bars plaintiff's recovery in this action.

2. Whether plaintiff's action is barred by the alleged exclusive remedy provision of the Federal Employees' Compensation Act (5 U.S.C. § 8116 (c)).

DONE this 28th day of December, 1984.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 84-7805 & 85-7288

D.C. Docket Nos. 84-1676 & 84-1676

MAGGIE BELL HEATHCOAT, as Administratrix of the Estate of LEONARD JAMES HEATHCOAT, Deceased, PLAINTIFF-APPELLEE

versus

KARL POTTS, ET AL., DEFENDANTS-APPELLANTS

Appeals from the United States District Court
for the Northern District of Alabama

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the

judgment of the said District Court in these causes be and the same are hereby, AFFIRMED; and these causes be and the same are hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 10, 1986

For the Court: Miguel J. Cortez, Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: SEP. 5, 1986

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7805 and 85-7288

MAGGIE BELL HEATHCOAT, ad Administratrix for the Estate of LEONARD JAMES HEATHCOAT, Deceased,
PLAINTIFF-APPELLEE

versus

KARL POTTS, ET AL., DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Northern District of Alabama

[Filed Aug. 28, 1986]

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ John C. Godbold
Chief Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 181483 40095

Supreme Court, U.S.
FILED
JAN 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-862

IN THE

Supreme Court Of The United States

October Term, 1986

KARL POTTS, et al.,
Petitioners

v.

MAGGIE BELL HEATHCOAT, ADMINISTRATRIX
FOR THE ESTATE OF
LEONARD JAMES HEATHCOAT,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a conflict exists among the circuit courts of appeals regarding application of the official immunity doctrine in a common law negligence/wrongful death action that justifies review by this Court.

2. Whether the court of appeals correctly denied the Petitioners' claim of official immunity in this case.

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No. 86-862

IN THE

Supreme Court Of The United States

October Term, 1986

KARL POTTS, et al.,
Petitioners

v.

MAGGIE BELL HEATHCOAT, ADMINISTRATRIX
FOR THE ESTATE OF
LEONARD JAMES HEATHCOAT,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Kathryn H. Sumrall and Elizabeth R. Jones, on behalf of Respondent Maggie Bell Heathcoat, oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in the case.

STATEMENT OF THE CASE

In addition to those facts outlined by Petitioners, Respondent wishes to add the following. Respondent's decedent, Leonard Heathcoat, was employed by the Tennessee Valley Authority (TVA) and was working at TVA's National Fertilizer Development Center in Muscle Shoals, Alabama, on the

date of his death, September 16, 1983. At the time of his death, Mr. Heathcoat was working on removing the roof of a building that was being dismantled. App., *infra,* A-1. Mr. Heathcoat was on the rooftop helping pry loose concrete slabs. "[H]e pried up one or two slabs, but the next slab collapsed beneath him and he fell approximately fifty feet to his death." *Id.*

Petitioners correctly state that each of them was in some capacity a supervisor of the removal operations at the jobsite where Leonard Heathcoat was killed. Petitioners were not, however, responsible for setting overall policies of TVA. (Deposition of Charles Davis, at 49). Petitioners were responsible for carrying out TVA's policies which had already been determined by its Board of Directors. (Deposition of Charles Davis at 19-20; Deposition of Herbert Plyler at 13; Deposition of William Snoddy at 59). A plan for removing the furnace buildings was in place before work was ever begun. (Deposition of William Snoddy at 58-59). The work being performed at the jobsite where Leonard Heathcoat was killed was essentially the same as any ordinary construction job. (Deposition of Herbert Plyler at 46).

REASONS FOR DENYING THE WRIT

1. No conflict exists among the circuit courts of appeals regarding application of the official immunity doctrine in a common law negligence/wrongful death action that justifies review by this Court.

Petitioners have failed to demonstrate a conflict among the circuit courts of appeals that justifies review by this Court. The case upon which Petitioners primarily rely as authority for their position that a "sharp conflict" exists is *Poolman v. Nelson,* 802 F.2d 304 (8th Cir. 1986). *Poolman* is a fraudulent misrepresentation case based upon communications between a county supervisor for the Farmers Home Administration (FmHA) and plaintiff who applied for a loan with the FmHA. Plaintiff was assured repeatedly by the defendant that his loan would be approved and he could bid on the farm property that

he wished to purchase. Plaintiff's loan was ultimately denied because his mother was an employee of the FmHA. Defendant knew that plaintiff's mother was an FmHA employee and consequently the loan application had no chance of being approved. The Eighth Circuit held that the statements made to plaintiff regarding his loan application were within the outer perimeter of the county supervisor's duties and thus absolutely immune under *Barr v. Matteo*, 360 U.S. 564 (1959). *Poolman*, 802 F.2d at 308.

The court in *Poolman* rejected the discretionary function requirement as a separate inquiry in determining whether a federal official is immune. *Id.* Instead, the court adopted the view that discretionary function is relevant only in defining the outer perimeter of an official's line of duty. *Id.* It is important to note that unlike Petitioners, the defendant in *Poolman* was, by virtue of his job title and description, an official of policymaking rank. In *Heathcoat*, the Eleventh Circuit held that "a government employee enjoys immunity only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the act or the line of duty." *Heathcoat v. Potts*, 790 F.2d 1540, 1542 (11th Cir. 1986) (emphasis in original).

Two important distinctions between *Poolman* and *Heathcoat*, and the reason these cases do not present a conflict in the circuits, is the underlying cause of action in each case and the dissimilar job functions of the defendant in *Poolman* and Petitioners. The defendant in *Poolman*, as a county supervisor for the FmHA, was an official of policymaking rank. Petitioners in this case describe their collective authority as merely "operational discretion." *Westfall v. Erwin*, No. 86-714, petition for cert. at 12. The analytical approach taken by the Eighth Circuit is distinguished from this case upon the fact that the court in *Poolman* did not have to consider the question of immunity for a non-policymaking official.

Additionally, *Poolman* is a speech case giving rise to a fraudulent misrepresentation claim. *Heathcoat* is a wrongful death action premised on the negligence of the individual Petitioners on the jobsite where Leonard Heathcoat was killed.

Cases which turn upon *statements* made by federal officials raise concerns regarding the free flow of public information and directly affect the "effective administration of policies of government." *Barr*, 360 U.S. at 571. Negligence actions may or may not have a similar effect.[1]

The truth of this proposition is reflected in Justice Black's concurring opinion in *Barr* in which he equates the effective functioning of government to informed public opinion.

> The effective functioning of a free government like ours depends largely on the force of an informed public opinion. . . . Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important. . . . So far as I am concerned, if federal employees are to be subjected to such restraints [libel suits] in reporting their views about how to run the government better, the restraint will have to be imposed by Congress and not by the general libel laws of the states or of the District of Columbia. *Barr v. Matteo*, 360 U.S. at 577 (Black, J., concurring) (footnotes omitted).

It is significant in evaluating the merits of Petitioners' petition that each of the cases decided by this Court regarding official immunity has been a speech case. *Spalding v. Vilas*, 161 U.S. 483 (1896); *Barr v. Matteo, supra*; *Howard v. Lyons*, 360 U.S. 593 (1959); *Doe v. McMillan*, 412 U.S. 306 (1973).[2] These

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[1] *Compare, Franks v. Bolden*, 774 F.2d 1552 (11th Cir. 1985), "[w]here, as here, the acts of federal employees have no noticeable implications for government policy, those employees are no more entitled to be free from responsibility for their acts than are employees in the private sector." *id.* at 1555; *and, Martinez v. Shrock*, 537 F.2d 765 (3rd Cir. 1976), *cert. denied*, 430 U.S. 920 (1977), held that the policy of government to attract qualified physicians to government service would be inhibited if plaintiff's claim for medical negligence was allowed. *id.* at 768.

[2] Each of the four cases decided by this Court regarding the application of official immunity has been a defamation case. *Spalding v. Vilas, supra*; *Barr v. Matteo, supra*; *Howard v. Lyons, supra*; *Doe v. McMillan, supra*. In the three cases in which the defense was allowed the defendant was an official of policymaking rank. *Spalding v. Vilas, supra*, (Postmaster General); *Barr v. Matteo, supra*, (Acting head of office of Rent Stabilization); *Howard v. Lyons, supra*, (Commanding Officer of Naval Shipyard). In *Doe v. McMillan*, in which the defense of official immunity was not al-

cases go to the heart of the effective functioning of government. It simply is not accurate to say that the Eighth Circuit's holding in *Poolman* creates a conflict with the Eleventh Circuit's holding in *Heathcoat*. The facts of the two cases are too disparate. The differing analytical approach taken in each case is a direct result of the facts presented.

The Eighth Circuit has not considered a case factually similar to *Heathcoat*. The Eleventh Circuit has, however, considered a speech case and arrived at a conclusion that is not in conflict with the Eighth Circuit. *Stepanian v. Addis*, 699 F.2d 1046 (11th Cir. 1983).

The plaintiff in *Stepanian* filed a common law slander action against the defendant, a federal prosecutor, for statements made at a press conference regarding plaintiff's indictment for criminal violations in connection with a land fraud. Plaintiff was acquitted of all criminal charges and thereafter sought damages for slander from the defendant.

The Eleventh Circuit stated that official immunity would attach "[i]f the disputed activities [were] discretionary and within the outer perimeter of the official's line of duty." *Id.* at 1048. The court then stated that "[t]he question presented here is how to define the scope of a prosecutor's protected authority." *Id.* Although the test for official immunity articulated by the court in *Stepanian* is different from the test stated in *Poolman*, the application of the test is identical. In *Poolman*, the court stated that discretionary function is a factor to be considered in defining the scope of an official's authority. In *Stepanian*, the court actually considered what discretion the defendant had to make the statements he made in order to "define the scope of [his] protected authority." *Id.*

The Eleventh Circuit stated that the defendant prosecutor's official authority to make statements was bounded by regula-

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lowed, defendants were the Public Printer and the Superintendent of Documents. These individuals were not officials of policymaking rank. Under this Court's own decisions speech cases are the only cases in which the defense of official immunity has been allowed and then only when the individual defendants are policymaking officials.

tion and if his comments went outside the regulation then his immunity would not be absolute. *Id.* at 1049. The court did not engage in any separate analysis of whether the statements made were part of a ministerial or operational non-discretionary function. Thus, in cases presenting the issue of immunity in the factual context of statements made by a government official, the Eighth Circuit and Eleventh Circuit are not in conflict. The petition in this case must fail because the decision of the Eleventh Circuit in this negligence action is not in conflict with any other federal court of appeals "on the same matter." Sup. Ct. R. 17.1.(a).[3]

2. The Eleventh Circuit correctly decided the issue of official immunity in this case.

Petitioners correctly point out that each of the courts of appeals has considered the issue of official immunity in some context. *Westfall,* No. 86-714, petition for cert. at 6-9. The Eleventh Circuit, however, is the only circuit to have extensively considered the issue in negligence actions such as the instant case.[4] *Andrews v. Benson,* No. 86-7049, appeal pending

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[3]I.e., negligence in the workplace. Petitioners cite cases from each circuit dealing with the issue of official immunity, *Westfall,* No. 86-714, petition for cert. at 6-9, with the exception of this case none of the cases cited concerns negligence in the workplace. The few federal courts other than the Eleventh Circuit that have considered the precise issue presented in this case are as follows: *Chavez v. Singer,* 698 F.2d 420 (10th Cir. 1983) (denying immunity to Department of Energy fire captain for acts of negligence. Defendant had no policymaking authority but was charged with operational control at the fire scene); *Tindall v. Moore,* 417 F.Supp. 548 (N.D. Ga. 1976) (denying immunity to supervisor at a mattress factory in a federal penitentiary for acts of negligence in removing safety guard from a machine); *Garner v. Rathburn,* 346 F.2d 55 (10th Cir. 1965) (immunity allowed for foreman in charge of paving crew at air force base for acts of negligence which were performed within the scope of defendant's duties and over which he had discretion); *Milligan v. American Hoist and Derrick,* 622 F.Supp. 56 (W.D. Tenn. 1985) (immunity allowed for TVA co-employee defendants who were exercising discretionary functions and acting within the outer perimeters of their lines of duty.

[4]While other federal courts have considered the issue of official immunity in negligence actions stemming from workplace injuries, *see, supra,*

(11th Cir.); *Heathcoat v. Potts*, 790 F.2d 1540 (11th Cir. 1986); *Erwin v. Westfall*, 785 F.2d 1551 (11th Cir. 1986); *Hendrix v. Patterson*, 779 F.2d 1056 (11th Cir. 1985); *Franks v. Bolden*, 774 F.2d 1552 (11th Cir. 1985); *Johns v. Pettibone*, 769 F.2d 724 (11th Cir. 1985).[5] The experience of the Eleventh Circuit is unique among the circuits; and its decision in each of the workplace negligence actions is correct under the guiding principles set forth in *Barr* and *Doe v. McMillan*, 412 U.S. 306 (1973).

This Court stated in *Doe* that the immunity conferred in *Barr* is not a "fixed, invariable rule of immunity," *id.* at 320, and that each case requires "a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh[s] the perhaps recurring harm to individual citizens." *Id.* This court also stated in *Doe* that official immunity will not automatically attach to any conduct which is "within the outer perimeter" of an individual's legally authorized duties. *Id.* at 322. The Court then determined that the defendants, the Public Printer and Superintendent of Documents exercised discretion in their jobs only with respect to estimating the demand for particular documents and adjusting the supply accordingly. Implicit in this determination is the fact that these defendants were not engaged in policymaking discretionary functions and consequently they were denied the defense of official immunity.

In *Barr* itself the Court states that the reason for the immu-

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note 3, no other circuit court of appeals has had the opportunity to consider the issue in consecutive cases in the way that the Eleventh Circuit has. *Heathcoat, supra*; *Erwin, supra*; *Johns, supra*; *Franks, supra*; *Hendrix v. Patterson*, 779 F.2d 1056 (11th Cir. 1985) (whether TVA co-employee defendants entitled to official immunity for workplace injuries; denial of immunity affirmed without opinion); *Andrews v. Benson*, No. 86-7049 (11th Cir.), appeal pending, (whether TVA co-employee defendants entitled to official immunity for workplace injuries).

[5]Eight judges of the Eleventh Circuit, Judges Godbold, Johnson, Tuttle, Roney, Hill, Hatchett, Vance and Morgan, and one district court judge sitting by designation, *see, Erwin v. Westfall, supra*, have considered the issue of official immunity in a negligence action and concluded that it was due to be denied to non-policymaking officials involved in day to day operations. *Heathcoat, supra*; *Erwin, supra*; *Franks, supra*; *Johns, supra*.

nity is to protect officials from damage suits for their official acts when those suits "might appreciably inhibit the fearless, vigorous, and effective administration of *policies* of government." *Barr*, 360 U.S. at 571 (emphasis added). This statement necessarily implies that if the policies of government are not affected by the suit for damages then official immunity can be no bar. The Eleventh Circuit, in this case, and in *Erwin*, *Johns*, and *Franks*, and *Hendrix*, applied this analysis to determine that officials engaged in non-policymaking and thus non-discretionary functions could not claim the defense of absolute immunity for their acts of negligence. *Heathcoat, supra*; *Erwin, supra*; *Johns, supra*; *Franks, supra*; *Hendrix, supra*.

In *Martinez v. Shrock*, 430 U.S. 921 (1971), three justices of this court reiterated the holding in *Barr* as follows:

> [T]his Court has recognized a very narrow category of judicially created absolute immunity for some federal officials. See, *Barr v. Matteo, supra*. However, such absolute immunity heretofore has only been applied to policymaking officials; and nowhere has it been suggested that there is a judicially created unqualified immunity for government functionaries operating at respondent's level.[6] *Id.*, (White, J., joined by Brennan and Marshall, J.J., dissenting).

The Eleventh Circuit has given full consideration to the issue of official immunity in four separate negligence cases and its decision in each case is correct and consistent with this Court's pronouncements regarding the application of official immunity.

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[6]In *Martinez*, certiorari was denied to review the decision of the Third Circuit granting official immunity to two Army surgeons for their acts of medical negligence. *See, supra*, note 1.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 84-7805, 85-7288

MAGGIE BELL HEATHCOAT, AS ADMINISTRATRIX FOR THE ESTATE OF LEONARD JAMES HEATHCOAT, DECEASED, PLAINTIFF-APPELLEE

v.

KARL POTTS, ET AL., DEFENDANT-APPELLANTS

Appeals from the United States District Court
for the Northern District of Alabama

June 10, 1986

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

GODBOLD, Chief Judge:

These consolidated appeals arise from the death of Leonard Heathcoat while he was employed by TVA in Muscle Shoals, Alabama under a personal services contract for temporary work.

Heathcoat was working on the dismantling of a building at TVA's National Fertilizer Development Center. His job was to cut steel supports below the roof as part of the effort to remove the roof. He went upon the roof to help pry loose concrete slabs, and pried up one or two slabs, but the next slab collapsed beneath him and he fell approximately 50 feet to his death.

Plaintiff, the widow as administratrix, filed this wrongful death action, pursuant to Alabama law, in state court, against

seven supervisors and staff specialists of TVA, seeking damages. The case was removed to the district court.

Plaintiff alleged that the defendants failed to provide her husband a safe place and environment in which to work and did not properly control the conditions, methods, and manner in which work was performed. The defendants answered and moved for summary judgment on the grounds that (1) they were federal supervisory employees exercising discretionary functions and acting within the outer perimeters of their lines of duty and thus are absolutely immune from this state tort action; (2) plaintiff's claim is barred by the release contained in Heathcoat's personal services contract with TVA; and (3) the action is barred by the exclusive remedy provisions of FECA, 5 U.S.C. § 8116(c) (1982), because the defendants were acting as alter egos or instrumentalities of TVA in fulfilling duties that TVA owed Mr. Heathcoat.

Following discovery, plaintiff responded to defendants' motion for summary judgment. The district court, without a hearing, denied defendants' motion without any statement of reasons.

Defendants filed a timely notice of appeal from the district court's order pursuant to 28 U.S.C. § 1291, on the ground that the denial of official immunity was appealable under the collateral order doctrine. This became case No. 84-7805. Contemporaneously defendants moved the court to certify under 28 U.S.C. § 1292(b) the two remaining questions presented by their motion for summary judgment. The district court granted the motion, this court granted permission to appeal, and this appeal became case No. 85-7288. The two appeals were consolidated.

A number of cases have permitted collateral order appeals from denial of a claim of absolute immunity. *See Williams v. Collins,* 728 F.2d 721 (5th Cir. 1984); *Chavez v. Singer,* 698 F.2d 420 (10th Cir. 1983); *Evans v. Dillahunty,* 711 F.2d 828 (8th Cir. 1983); *McSurely v. McClellan,* 697 F.2d 309 (D.C. Cir. 1982); *Forsyth v. Kleindienst,* 599 F.2d 1203 (3rd Cir. 1979). Heathcoat contends that this case is not within *Cohen*

v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) because it does not present a serious and unsettled question. We hold that *Cohen* applies. The unsettled nature of a serious question is demonstrated by events in this court that followed the taking of the instant appeal.

In March 1985 we held in *Johns v. Pettibone Corp.*, 755 F.2d 1484 (11th Cir. 1985) that defendant TVA employees enjoyed absolute immunity for ordinary torts committed within the scope of their jobs unless the tort alleged was of constitutional magnitude. On August 26, 1985 the court withdrew its March opinion and entered another opinion. On petition for rehearing and rehearing en banc, on November 12, 1985, the court deleted part C of the August 26 opinion and substituted a new part C, covering the immunity issue. The August 26 opinion, as amended by the opinion of November 12, appears at 769 F.2d 724 (11th Cir. 1985).

Intervening in these events, a different panel handed down for the court on November 4, 1985, *Franks v. Bolden*, 774 F.2d 1552 (11th Cir.), *reh'g en banc denied*, 781 F.2d 905 (1985), holding that official immunity did not extend to acts performed by TVA employee-defendants concerning day to day operations and not involving planning or policy consideration. Despite the later issue date of the opinion, *Franks* cites to the November 12 amended opinion entered in *Johns*.

Also to be considered is *Hendrix v. Patterson*, 776 F.2d 1056 (11th Cir.) (order without opinion), *reh'g en banc denied*, 779 F.2d 60 (1985), an unpublished opinion issued October 24, 1985 and handed down for the court by the same panel that decided *Franks*. Citing both *Franks* and the November 12 opinion in *Johns*, it holds summarily that the acts of the TVA defendants at issue were operational in nature and involved no governmental policy or planning concerns, thus official immunity was not available.

Despite this confusing sequence of events the governing principle is clear: a government employee enjoys immunity only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the act or the line of duty. *Johns*, 769 F.2d

at 728. "Discretionary acts" involve planning or policy considerations and do not concern day to day operations. *Franks,* 774 F.2d at 1555.

In *Johns* the district court granted summary judgment to the defendants on the ground that plaintiff's decedent was an invitee on TVA property and the individual TVA defendants had no duty to warn invitees of the hazard involved. On appeal the TVA defendants asserted immunity as an alternative ground supporting the summary judgment, although the issue had not been mentioned by the court in granting summary judgment. This court declined to reach the issue under these circumstances and remanded it to the district court to deal with it. In *Franks* the district court had conducted a hearing on the immunity issue, and the case had been tried before a jury with a verdict for plaintiffs. Thus the issue was before the court of appeals on a full record, and this court held, construing all the evidence in the light most favorable to the TVA defendants, that there was no way in which the acts in question could be termed anything but operational. 774 F.2d at 1555 n.3. *Hendrix* also had been tried to a jury which returned a verdict for plaintiffs. Presumably, as in *Franks,* there was a full record for this court to consider.

In this case the seven individual defendants are: Karl Potts, chief maintenance branch, division of chemical operations; Clyde Snoddy, general foreman; Ray Montgomery, hazard control specialist; Charles Davis, assistant office manager; Kenneth Rhoden, assistant branch chief, maintenance branch; Robert Mitchell, assistant director, division of chemical development; and Herbert Plyler, safety specialist.

Each of these defendants was in some fashion a supervisor of the removal operations being conducted by TVA's Office of Agricultural and Chemical Development. The summary judgment record contains job descriptions for each of the defendants and the defendants' answers to interrogatories propounded by the plaintiff. The job descriptions are detailed but abstract. The responses to the plaintiff's interrogatories are defensive and unilluminating. On this record we find no error

in the denial of summary judgment on immunity grounds; whether, on a fuller development of the facts, an immunity defense might prove meritorious is for the district court.

FECA bar

Plaintiff made a claim for her husband's death under the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101-8193. The defendants contend that the exclusive remedy provision of FECA, 5 U.S.C. § 8116(c), bars this suit.[1] FECA is silent on the matter of co-employee suits. The FECA provides that if the United States and its "instrumentalities" are liable under its provisions, recovery under this act is the employee's exclusive remedy against these parties. 5 U.S.C. § 8116 (c) (1982). In *Allman v. Hanley*, 302 F.2d 559, 563 (5th Cir. 1962), this court held that this provision does not bar suits by co-employees. The Sixth Circuit in *Bates v. Harp*, 573 F.2d 930, 935 (6th Cir. 1978), adopted the Fifth Circuit approach. Defendants try to distinguish these cases on two grounds. First, they argue that these cases only decided the issue of whether the statute created a per se bar to suits against co-employees and therefore courts are free to determine on a case by case basis whether a particular co-employee is an "instrumentality." This distinction fails because the courts in *Allman* and *Bates* held that absent specific language the statute should not be construed to abrogate the common law right to sue a co-employee.

Defendants also attempt to avoid the bite of *Allman* by arguing that the court in *Allman* ruled that this statute should be construed in accordance with the law in the majority of the states and that since the decision in *Allman* the majority of states have adopted a contrary rule. This argument fails for two reasons. First, the *Allman* court did not establish such a rule; it only looked to the law of the majority of states to determine what the common law was so that it could apply the

[1]The court in *Franks* declined to address this issue because it had not been presented to the district court. 774 F.2d at 1554 n.2.

canon of statutory construction that a court will assume that Congress changed the existing law when the statute shows a clear manifestation of intent on the part of Congress to do so. Second, defendants' proposed rule would allow states to change the contours of established federal law where there is no indication that Congress had any intention of delegating such power to the states. As just noted, the court in *Allman* only looked to the common law of the states to determine the context in which Congress acted; it did not decide that state law controls interpretation of federal law.

Defendants' final contention is that this suit is barred because the Alabama Supreme Court in *Slagle v. Parker*, 370 So. 2d 947 (Ala.1979), held that provisions of the Workmen's Compensation Act immunized co-employees from wrongful death suits. *See* Ala.Code 25-5-11. There is no indication that the TVA is covered by the Alabama Workmen's Compensation Act. The fact that the Alabama legislature has relieved employees of participating employers from certain liabilities does not imply that they wished to relieve employees of the federal government of the same liability. In the first situation, the relief is part of one compensation scheme enacted by the state; the second situation would involve applying part of that scheme to an unrelated compensation scheme.

Waiver

As we pointed out Heathcoat was covered by FECA and payments are being made to plaintiff pursuant to its terms. The defendants' waiver argument is based upon paragraph 6 of the contract under which Heathcoat was employed, which provided:

> 6. In the event that Contractor sustains personal injuries in the course of and arising out of the performance of services or travel under this contract and such injuries do not fall within the coverage of the Federal Employees' Compensation Act, TVA agrees to pay the injured party such medical expenses as in the opinion of TVA's Medical Di-

> rector may be necessary as a part of proper and adequate treatment for such injuries. In consideration of such agreement by TVA, Contractor hereby waives any claim, demand, action, or cause of action that Contractor may have against the United States, TVA, its agents, employees, or Contractors arising out of, resulting from, or in any way connected with such personal injuries. Contractor agrees to observe all safety rules required by TVA.

This waiver is "in consideration of TVA's effort to protect the contractor *if he was not adequately protected under FECA*." (emphasis supplied). This extension of coverage by TVA (its "effort") fills a hole in the contractor's protection by affording supplemental compensation-type benefits for non-FECA claims.

For its part, by the first sentence of paragraph 6, TVA agrees to pay medical expenses for such a non-FECA injury. Thus: If a "contractor sustains personal injuries . . . and such injuries do not fall within the coverage of [FECA]. . . ." then TVA agrees to pay "such medical expenses" as sustained for treatment "for such injuries."

In consideration of TVA's undertaking, the second sentence of paragraph 6, the contractor waives claims "arising out of, resulting from, or in any way connected with *such injuries*." The "such injuries" the claims for which the contractor gives up by the second sentence are the same "such injuries" that TVA agrees to become responsible for by the first sentence, that is, *claims falling outside of FECA*. The contractor gets the added protection of compensation-type benefits for injuries not falling within the applicable compensation act, and he waives his right to sue for the injuries included within this additional coverage. This is a square trade-off. It is the historical trade-off where compensation-type benefits are provided.

Defendants contend that Heathcoat waived any cause of action for injuries arising out of the performance of services under his contract. This bar to the whole universe of injuries would assign to "such personal injuries", in the second sentence, a meaning that sweeps much more broadly than the

"such injuries", "such medical expenses," and "such injuries" as they appear in the first sentence. This reading is not supported by the language of paragraph 6 itself or anything else in the record. It is an implausible reading of paragraph 6 and an implausible trade-off as well.

The proof of the pudding – that the "such personal injuries" that are waived in the second sentence do not mean the whole universe of injuries sustained under a contract with TVA – is that such a waiver would bar Heathcoat's FECA claim. It would be a useless act for TVA to extract a waiver for a claim covered by FECA, which contains its own exclusive remedy clause (which TVA asserts as a bar). And, if the defendants' argument were correct, the FECA benefits that TVA is currently paying to plaintiff's estate are being paid even though they were waived by paragraph 6. Thus defendants' interpretation is inconsistent with TVA's own interpretation of paragraph 6.

The overall scheme is straightforward, clear and simple:

> (1) Injuries under FECA are covered by FECA itself, which contains its own limitations on right to sue.
>
> (2) TVA has supplemented FECA by agreeing to pay medical expenses for non-FECA injuries.
>
> (3) The contractor has waived his right to sue on non-FECA claims falling within the supplementary coverage.

Applying the scheme to this case, the paragraph 6 waiver has no application to this claim for damages which is for injuries that fall within the coverage of FECA.

AFFIRMED and REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-2000

KARL POTTS, KENNETH RHODEN, CLYDE SNODDY, RAY MONTGOMERY, HERBERT PLYLER, CHARLES DAVIS and ROBERT D. MITCHELL, PETITIONERS

versus

MAGGIE BELL HEATHCOAT, Administratrix for the Estate of LEONARD JAMES HEATHCOAT, Deceased, RESPONDENT

On Application for Leave to Appeal
from an Interlocutory Order

[Filed Apr. 30, 1985]

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

BY THE COURT:

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is GRANTED. The clerk shall consolidate with No. 84-7805.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV84-AR-1676-S

MAGGIE BELL HEATHCOAT, as Administratrix for the Estate of Leonard James Heathcoat, PLAINTIFF

v.

KARL POTTS, ET AL., DEFENDANTS

[Filed Oct. 22, 1984]
[Denied Dec. 10, 1984]

MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANTS POTTS, RHODEN, SNODDY, MONTGOMERY, DAVIS, MITCHELL, AND PLYLER

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendants Potts, Rhoden, Snoddy, Montgomery, Davis, Mitchell, and Plyler respectfully move the Court for judgment in their favor dismissing this action against them with prejudice on the grounds that the pleadings, answers to interrogatories, and other papers on file, together with the affidavits of Talmadge Wood and H. D. Hester filed herewith, establish the following defenses as a matter of law:

1. Plaintiff's claims against these defendants are barred by the release in plaintiff's decedent's personal services contract with Tennessee Valley Authority (TVA).

2. Plaintiff's claim is barred by the exclusive remedy provisions of the Federal Employees' Compensation Act because at all relevant times the defendants were acting as alter egos or instrumentalities of TVA in fulfilling duties which TVA owed plaintiff's decedent.

3. At all relevant times the defendants were Federal employees exercising discretionary functions and acting within the outer perimeters of their lines of duty and thus are absolutely immune under the official immunity doctrine from this tort action.

Respectfully submitted,

/s/ Herbert S. Sanger, Jr.

HERBERT S. SANGER, JR.
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902
Telephone No. 615-632-2241
FTS No. 856-2241

/s/ James E. Fox

JAMES E. FOX
Associate General Counsel

/s/ Robert C. Glinski

ROBERT C. GLINSKI

/s/ Ralph E. Rodgers

RALPH E. RODGERS
Attorneys for Defendants
Potts, Rhoden, Snoddy,
Montgomery, Davis,
Mitchell, and Plyler

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 84-AR-1676-S

MAGGIE BELL HEATHCOAT, Administratrix for the Estate of Leonard James Heathcoat, PLAINTIFF

vs.

KARL POTTS, ET AL., DEFENDANTS

[Filed Dec. 28, 1984]

ORDER

Defendants Potts, Rhoden, Snoddy, Montgomery, Davis, Mitchell and Plyler, pursuant to 28 U.S.C. § 1292(b), have requested this court to certify two questions for appeal which would not otherwise be appealable. Because an appeal as to one issue has already been taken by defendants as a matter of right, and because the court agrees with defendants that the other issue upon which they wish to appeal involves controlling questions of law, any one of which would be dispositive of the case if they are correct, and because there is substantial ground for difference of opinion so that an immediate appeal from the order of December 10, 1984, as to the additional issues may materially advance the ultimate determination of the litigation, the court hereby STAYS the proceedings in the district court and CERTIFIES to the Court of Appeals for the Eleventh Circuit the following questions:

1. Whether the release contained in Leonard Heathcoat's personal service contract bars plaintiff's recovery in this action.

2. Whether plaintiff's action is barred by the alleged exclusive remedy provision of the Federal Employees' Compensation Act (5 U.S.C. § 8116(c)).

DONE this 28th day of December, 1984.

/s/ William M. Acker, Jr.

WILLIAM M. ACKER, JR.
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 84-7805 & 85-7288

D.C. Docket Nos. 84-1676 & 84-1676

MAGGIE BELL HEATHCOAT, as Administratrix of the Estate of LEONARD JAMES HEATHCOAT, Deceased, PLAINTIFF-APPELLEE

versus

KARL POTTS, ET AL., DEFENDANTS-APPELLANTS

Appeals from the United States District Court
for the Northern District of Alabama

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same are hereby, AFFIRMED; and these causes be and the same are hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellants pay to plain-

tiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 10, 1986

For the Court: Miguel J. Cortez, Clerk

By: /s/ Warren A. Godfrey

Deputy Clerk

ISSUED AS MANDATE: SEP. 5, 1986

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7805 and 85-7288

MAGGIE BELL HEATHCOAT, as Administratrix for the Estate of LEONARD JAMES HEATHCOAT, Deceased, PLAINTIFF-APPELLEE

versus

KARL POTTS, ET AL., DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Northern District of Alabama

[Filed Aug. 28, 1986]

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ John C. Godbold

Chief Judge

(3)

Supreme Court, U.S.
FILED
FEB 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-862

In the Supreme Court of the United States

OCTOBER TERM, 1986

KARL POTTS, ET AL., PETITIONERS

v.

MAGGIE BELL HEATHCOAT, ADMINISTRATRIX FOR THE ESTATE OF LEONARD JAMES HEATHCOAT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-862

KARL POTTS, ET AL., PETITIONERS

v.

MAGGIE BELL HEATHCOAT, ADMINISTRATRIX FOR THE ESTATE OF LEONARD JAMES HEATHCOAT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

This case presents the same issue as *Westfall* v. *Erwin*, petition for cert. pending, No. 86-714, and we therefore suggested in our petition that the Court hold this case pending its disposition of the petition in *Westfall*. In order to facilitate the Court's consideration of the issue presented in these cases, respondent's arguments opposing certiorari are addressed in the reply memorandum that we have filed in *Westfall*. (We have served respondent's counsel with a copy of that reply memorandum.)

Respectfully submitted.

CHARLES FRIED
Solicitor General

EDWARD S. CHRISTENBURY
General Counsel
Tennessee Valley Authority

FEBRUARY 1987